SUPREME COURT, U. S.

JAN 10 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-835

MARK WHITE, JR.
Secretary of State of Texas
Petitioner

VS.

MARILYN WHATLEY AND CAROL GERBER ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID R. RICHARDS
600 West 7th Street
Austin, Texas 78701

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and of the Circuit Court of Appeals of the Fifth Circuit are reproduced in the appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1- Must a state statute, which admittedly segregates and burdens the right to vote of one class of citizens, i.e. students, be supported by a compelling state interest in order to satisfy Constitutional requirements?

2- May a state Constitutionally impose as a condition of voting, a residency test that requires the individual to avow an intent to remain permanently or indefinitely as a resident of the political subdivision?

STATUTE INVOLVED

Article 5.08(k) of the Texas Election Code provides:

> "(k) The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student."

STATEMENT OF THE CASE

Declaratory Judgment was granted by the District

Court invalidating a portion of the Texas Election Code which provided in part:

> "A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and make that place his home indefinitely after he ceases to be a student." Article 5.08(k) Texas Election Code.

The cause of action was alleged to arise under the Fourteenth and Twenty-sixth Amendments of the Constitution of the United States and 42 USC Section 1983 and 28 USC Section 1343. Plaintiffs did not seek injunctive relief, asking only for declaratory judgment under 28 USC § 2201.

The Defendant tax assessor of Denton County, relying "only upon the provisions of Article 5.08(k) of the Texas Election Code" instructed all deputy registrars to "refuse registration to any student who indicates an uncertainty about whether he intends to remain in Denton County after graduation." (Responses to Interrogatories, J.A. 21). In keeping with this "uniform policy", the Plaintiff-Green was denied voter registration in Denton County (id. at 21-3).

Green at the time he sought to register was a student at North Texas State University in Denton, lived in Denton in an off-campus apartment and was employed part-time in Denton. (J.A. 47-51) Green testified that he considered himself to be a resident of Denton, because "everything that I am associated with that I care about is in Denton" and that he did not consider himself to be a resident of Dallas where his parents

lived. (J.A. 42) Nevertheless, as found by the trial court, Green was denied the right to register as a voter "solely because (he) was unable to affirm an intent to reside in Denton County indefinitely after he ceases to be a student."

One of the Defendants was Bob Bullock, then Secretary of State of Texas and the State's chief election officer. As found by the circuit court, Bullock testified "unequivocally that Article 5.08(k) created a 'special classification' that served no purpose other than to discourage students from voting." (Pet. for Cert. 10a)

ARGUMENT

The reasons asserted for granting this writ are notable primarily for their insubstantiality.

The first basis is an asserted conflict between two United States District Courts as to the constitutionality of Article 5.08(k). If such a conflict does exist, it will presumably be resolved in the United States Court of Appeals for the Fifth Circuit without the necessity of imposing upon this Court's jurisdiction. There is no suggested conflict among the courts of appeals.

The second ground is an evidentiary complaint concerning the testimony of one of the original Defendants in this proceeding, former Secretary of State Bob Bullock. The bulk of the testimony was admitted without objection, and was clearly probative on the questions at hand. In any event, we do not perceive how this complaint falls within the reach of Rule 19.

The third ground speaks with no greater force. The

overwhelming weight of authority supports the reasoning of the Courts below. *Wilkins v. Bentley*, 189 N.W. 2d 423 (Sup. Ct. Mich., 1971); *Jolicouer v. Mihally*, 488 P. 2d 1 (Sup. Ct. Calif., 1971); *Worden v. Mercer County Board of Elections*, 61 N.J. 325, 294 A.2d 233 (Sup. Ct. N.J., 1972); *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D., N.Y., 1972); *Newburger v. Peterson*, 344 F.Supp. 559 (D. N.H., 1972); *Anderson v. Brown*, 332 F. Supp. 1195 (S.D. Ohio, 1971); *Bright v. Baesler*, 336 F. Supp. 527 (E.D. Ky., 1971); *Johnson v. Darrell*, 337 F. Supp. 138 (S.D. Ind., 1971); *Kennedy v. Meskill* (unreported) (D. Conn., 1971, Civ. No. 14,548); *Phillips v. Beng* (unreported) (E.D. Ill., 1972, Civ. No. 71-234-D).

Assuredly under this Court's analysis in *Dunn v. Blumstein*, 405 U.S. 330 (1972), this statutory restriction on voting residency must serve some compelling State interest. No testimony was offered by the State to justify the burden that the statute admittedly places upon potential student voters. The "purity of the ballot box" argument, which is now made by the State will not survive analysis. For only students are treated as presumptive non-residents by the statute. They are not asked whether they intend to remain indefinitely within the community, rather they are asked to project beyond graduation and avow an intent to remain indefinitely after the conclusion of their schooling. Such a requirement cannot be related to prevention of fraudulent voting, as opined by the Defendant Bullock, it was designed to discourage students from voting.

One of the problems with the State's argument is demonstrated by the plight of Randolph Grayson, one of the Plaintiffs in *Wilson v. Symm*, which the State has chosen to print as part of the supplemental

appendix. Grayson was 29 years old and born in Gulfport, Mississippi. Upon discharge from the Army he came directly to Waller County, Texas where he had lived for four years while attending Prairie View College. Under the authority of the Texas statute, he was denied voter registration in Waller County (Supp. App. 25-26) on the ground that he was not a resident. Texas would apparently say to Mr. Grayson "he does not lose his vote but must vote in his county of his domicile where his parents live" (Pet. for Writ of Cert., p. 8). Under the State's analysis of its statute, Grayson, who had not lived in Gulfport, Mississippi since he entered the Army, remains a voting resident of Mississippi and his four years residence in Texas does not entitle him to vote in this State. A statute that works such an improbable result cannot be justified on some arcane notions of purity of the ballot box.

The vice of the Texas statute may lie in its attempt to employ traditional concepts of domicile as a test of voting residency. The Court below did not reach this question (see fn. 4), however this analysis provides an alternative justification for the Court's holding. For the "indefinite intention" test of domicile simply asks too much of the potential voter. As Circuit Judge Friendly speaking for the three-judge court in *Ramey v. Rockefeller*, 348 F. Supp. 780, 788 (E.D. New York, 1972) viewed it:

> "Against this it is contended that, in these days of an increasingly mobile society, it would be the rare citizen who could swear honestly that he intended to reside at his present address permanently; even if the test of indefinite intention is different, there would undoubtedly be many citizens with 'definite' hopes of moving to better job opportunities, more pleasant climates, and the like. If such a

test were in fact imposed on all citizens, it would go too far in restricting the vote to the more immobile elements of the populace; it would penalize, perhaps irrationally, those who make definite plans, while allowing the drifters who have uncertain plans to vote. And if the test were in fact only applied to students, then it would be an impermissible discrimination against them.

Thus, we think that the only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future. The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern." See also *Newburger v. Peterson*, 344 F. Supp. 559 (D. N.H., 1972).

Conclusion

For the foregoing reasons it is respectively submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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